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No. 73-606

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In the Supreme Court of the United States

OCTOBER TERM, 1973

SIDNEY ROSS LANGLEY AND CHARLES SIDNEY LANGLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the trial court and the court of appeals applied an erroneous standard in evaluating the sufficiency of the circumstantial evidence upon which they were convicted.

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted on Count I of an indictment charging them and others with conspiring to produce distilled spirits, in violation of 26 U.S.C. 5601(a)(8) and 18 U.S.C. 371. Petitioner Sidney Ross Langley was also convicted on Counts II and III, charging illegal possession of a still and distilling apparatus, in violation of 26 U.S.C. 5601(a)(1), and illegal carrying on of the business of a distillery, in violation of 26 U.S.C. 5601

(a)(4). Each petitioner was sentenced to three years' imprisonment on Count I and fined $5,000. Sidney Ross Langley was also sentenced to additional three-year terms of imprisonment on Counts II and III, to run concurrently with the sentence imposed on Count I (Pet. App. 8-10).

1. Petitioners contend that when the government's case is based wholly on circumstantial evidence, "the test to be applied by the Trial Judge when ruling upon the Petitioners' motions for Judgment of Acquittal is that such motions should be allowed when the evidence is circumstantial and completely consistent with Petitioners' innocence, and when such evidence is of such nature that a jury might reasonably conclude that it fails to exclude every reasonable hypothesis but that of guilt" (Pet. 4). They urge that this test was not followed in the instant case and that the decision conflicts with the rule in the Fifth Circuit. This claim is insubstantial. In a recent case, the Court of Appeals for the Fifth Circuit held that its standard is basically the same as that used in other circuits (*United States* v. *Warner*, 441 F. 2d 821, 825 (C.A. 5), certiorari denied, 404 U.S. 829):

> Nothwithstanding these differences, which some might term verbalistic, we are in agreement with our brothers in other circuits that whether the evidence be direct or circumstantial, the matter of the defendants' guilt is for the jury to decide unless the court concludes that the jury must necessarily have had a reasonable doubt.

The court below was in complete accord with the Fifth Circuit in stating that the standard urged by petitioners was "only another form of the rule that the jury must be convinced beyond a reasonable doubt"

(Pet. App. 3). The court below did not reject the "test" propounded by petitioners; it merely pointed out that it was only another form of the standard used in all the circuits. There is no occasion for further review on this issue. See Wright, *Federal Practice and Procedure (Criminal),* Section 467 (1969 ed.).

2. The court below reviewed the evidence and properly concluded that there was substantial proof to support the district court's denial of petitioners' motions for judgments of acquittal. We rely upon that opinion (Pet. App.) in urging that the petition for a writ of certiorari be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General,

JANUARY 1974.

DOJ-1974-01